STATE OF MICHIGAN

COURT OF APPEALS

In re KRIVY ESTATE.

JOSEPH M. KRIVY,

Petitioner-Appellant,

v

DOUGLAS D. JOHNSON, MICHAEL JOHNSON, and CONNIE JOHNSON-HERRERA,

Respondents-Appellees.

UNPUBLISHED
October 18, 2005

No. 256089
Arenac Probate Court
LC No. 04-007370-DE

Before: Talbot, P.J., and White and Wilder, JJ.

PER CURIAM.

Petitioner appeals as of right from the trial court's order admitting an authenticated[1] copy of the decedent's will to probate. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Decedent executed a will on October 7, 1996. She left her attorney's office that day with the original and a copy, and there is no evidence that anyone has seen the original since. Members of the attorney's office staff testified that they advised decedent on the importance of the will and instructed her to keep it in a safe place. The attorney who supervised the creation of the will and one of the witnesses to its execution both testified that the copy of the will admitted during trial was identical to the original. The attorney also indicated that decedent knew the content of her will, and that he believed that it accurately expressed her wishes regarding the distribution of her estate. The attorney added that decedent never contacted his office to make changes to her will or to inform him that she had destroyed it, and he believed that if decedent wanted to change or destroy her will she would have contacted his office.

[1] "[A]uthentication is 'satisfied by evidence sufficient to support a finding that the matter in question is what the proponent claims.'" *In re Christoff Estate*, 193 Mich App 468, 471; 484 NW2d 743 (1992), quoting MRE 901(a). The parties do not dispute the authenticity of the document at issue in this case.

Decedent died on January 13, 2004. She was survived by two offspring, one of them petitioner, and three grandchildren, who are the respondents. After the funeral, petitioner conducted a thorough search of decedent's residence for her will, but was unable to find the original. However, he found a copy of the will in a bag in the freezer, where decedent was known to keep her important papers. Petitioner also found an original handwritten codicil in that bag.

Petitioner subsequently filed a petition with the probate court for an intestacy proceeding, alleging that decedent had revoked her will. Respondents, in turn, filed a petition for admission of an authenticated copy of the will and the codicil. There was no evidence presented at trial that the decedent lost or destroyed the original will, beyond petitioner's inability to find it. Both petitioner and decedent's daughter described decedent as a strong-willed, sound-minded, intelligent woman who took care of her own matters. The court reasoned that if decedent intended to destroy her will she would not have kept an identical copy with the codicil in the freezer with her other important papers. Petitioner argued that there is a rebuttable presumption that a missing will has been destroyed and thus revoked. The court held that any such presumption was rebutted in this instance, and admitted the copy to probate. See MCL 700.3402(1)(c).

This Court reviews the probate court's factual findings for clear error. *In re Wojan Estate*, 126 Mich App 50, 53; 337 NW2d 308 (1983). "A finding is clearly erroneous if although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been made." *In re Miller*, 433 Mich 331, 337; 445 NW2d 161 (1989) (internal quotation marks and brackets omitted). This Court will "defer to the probate court on matters of credibility, and will give broad deference to findings made by the probate court because of its unique vantage point regarding witnesses, their testimony, and other influencing factors not readily available to the reviewing court." *In re Estate of Erickson*, 202 Mich App 329, 331; 508 NW2d 181 (1993). See also MCR 2.613(C).

MCL 700.3402(1)(c) governs the admission of a copy where an original will is lost:

> If the original will is not in the court's possession or neither the original will nor an authenticated copy of a will probated in another jurisdiction accompanies the petition, the petition must also state the will's contents and shall indicate that the will is lost, destroyed, or otherwise unavailable.

Respondents argue that a copy of decedent's will was properly admitted to probate because the original was lost or otherwise unavailable, while petitioner argues that a copy was erroneously admitted because the original will was presumed destroyed and, thus, revoked.

Petitioner, as contestant of the will, has the burden of establishing revocation. MCL 700.3407(1)(c). A testator can revoke a will by performing a revocatory act on the will with the intent and purpose of revocation. MCL 700.2507(1)(b). A "revocatory act on the will includes burning, tearing, canceling, obliterating, or destroying the will or part of the will." *Id.* (internal quotation marks omitted).

When the original will cannot be found upon the death of the testator, and the testator was in possession of the original, there exists a rebuttable presumption that it was destroyed with

the intent to revoke it. *In re Christoff Estate*, 193 Mich App 468, 473; 484 NW2d 743 (1992), quoting MRE 901(a); *In re Smith Estate*, 145 Mich App 634, 637; 387 NW2d 555 (1985). Whether the presumption is rebutted is a question of fact. *In re Taylor's Estate*, 323 Mich 101, 108; 34 NW2d 474 (1948). Petitioner asserts that the presumption should hold sway in this case.

Respondents argue that this presumption no longer exists in the law, citing the enactment of the comprehensive Estates and Protected Individuals Code,[2] and emphasizing that the code sets forth no such presumption. However, assuming without deciding that the common-law presumption remains in force, we agree with the trial court that respondents have cleared that elevated hurdle.

As previously noted, the copy and the codicil were found together in a freezer where decedent kept all of her important papers. Decedent's attorney testified that she knew the content of her will, and that he believed that it accurately expressed her wishes. He further opined that decedent would have contacted him if she wanted the will changed or revoked, because that is what she had done previously.

For these reasons, we conclude that the trial court did not clearly err in holding that decedent had not revoked her will and, thus, properly admitted the authenticated copy in to probate.

Affirmed.

/s/ Michael J. Talbot
/s/ Helene N. White
/s/ Kurtis T. Wilder

[2] MCL 700.1101 *et seq.*